

required before the slide recuts would be released to them, and that they are unable to pay for the slides themselves. Motion at 2; see *also* Reply at Tabs A and B (Affidavits of petitioners). Respondent filed her response to petitioners' motion on April 15, 2013. Petitioners filed a reply brief on April 25, 2013.

For the reasons outlined below, I find that an award of advanced interim costs is not appropriate at this time.

I. Applicable Law.

Although the Vaccine Act itself is silent on the issue of interim awards of fees and costs, it is now clear that interim fees and costs may be awarded in Vaccine Act cases. *Avera v. Sec'y, HHS*, 515 F.3d 1343, 1352 (Fed. Cir. 2008); *Cloer v. Sec'y, HHS*, 675 F.3d 1358, 1362 (Fed. Cir. 2012). Prevailing on the merits is not a requirement for any Program award for fees and costs, but unsuccessful litigants must demonstrate that their claim was brought in good faith, a subjective standard, and upon a reasonable basis, an objective standard. § 15(e)(1); *Perreira v. Sec'y, HHS*, No. 90-847V, 1992 WL 164436, at *1 (Cl. Ct. Spec. Mstr. June 12, 1992) (describing good faith as subjective and reasonable basis as objective), *aff'd*, 27 Fed. Cl. 29 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). Thus, a Vaccine Act litigant seeking an award of fees and costs before entitlement to compensation is determined must, at a minimum, establish good faith and a reasonable basis for the claim. See *Avera*, 515 F.3d at 1352.

It is also clear that interim fees and costs need not be awarded in all circumstances, although the factors that delineate when an interim award is appropriate remain somewhat muddled. See *Shaw v. Sec'y, HHS*, 609 F.3d 1372, 1375 (Fed. Cir. 2010); *Avera*, 515 F.3d at 1352. In *Avera*, the Federal Circuit noted that “[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained.” *Avera*, 515 F.3d at 1352. It has also held that “[w]here the claimant establishes that the cost of litigation has imposed an undue hardship and that there exists a good faith basis for the claim, it is proper for the special master to award interim attorneys’ fees.” *Shaw*, 609 F.3d at 1375. Nonetheless, “[t]he special master may determine that she cannot assess the reasonableness of certain fee requests prior to considering the merits of the vaccine injury claim.” *Id.* at 1377.

II. Contentions of the Parties.

A. Petitioners’ Motion.

Petitioners maintain that although counsel in the Vaccine Program will frequently pay for costs that arise during the litigation of a claim, there is no requirement for counsel to “front” the expenses. Motion at 6. They note that § 15(e) permits payment of awards “to cover *petitioner’s* reasonable attorneys’ fees and *other costs*.” (emphasis added by petitioners) and not *petitioner’s counsel’s* costs. Combined with the Federal Circuit’s decisions recognizing payment of interim fees and costs is permitted,

petitioners urge me to grant their motion and thus advance funds to pay for the slides. Motion at 4-5.

Petitioners concede that the filing of autopsy slides is not required by the Vaccine Act, but note that a special master “may require such evidence as may be necessary and may require the submission of such information as may be reasonable and necessary.” Motion at 7 quoting § 12(d)(3)(B)(i)-(ii). Petitioners also reference the Act’s legislative history noting it states that “parties are of course, free to request that the Master develop the record by obtaining necessary information. (For example, the master might be asked to subpoena further records.)” Motion at 8 quoting 135 CONG REC. H9333-01, H976. Petitioners imply that I should order them to obtain the slides and, thus having required them to do so, I should provide the necessary funds to acquire the slides by granting their motion for advance payment of interim costs. See Motion at 7-9.

B. Respondent’s Response.

Respondent argues an award of interim costs is inappropriate at this time and urges the court to deny petitioners’ motion until the case is concluded or such time as an interim award is appropriate under *Avera*. Response, filed Apr. 15, 2013, at 3-6. Specifically, respondent observes that this case has been pending for less than a year and therefore cannot be considered a “protracted proceeding” (*id.* at 4-5), contends that the \$500.00 petitioners are seeking is not an expense that should be considered “costly” when compared to the other expenses typically associated with a Vaccine Case (*id.* at 5), and notes that petitioners provided no details as to why paying the expense would create an undue hardship on them. *Id.*

Respondent also argues that petitioners’ motion should be denied because they have not established the necessity of obtaining the slides, and neither respondent nor I have requested that petitioners obtain the slides. Response at 5-6. If petitioners or petitioners’ expert believe the slides would assist in establishing entitlement to compensation, then respondent contends that the cost should be submitted, along with the petitioners’ other expert and litigation costs, at the conclusion of the case. Additionally, respondent asserts that petitioners’ request for costs is inconsistent with the plain language of the Vaccine Act because petitioners are seeking an advancement of funds and not payment for costs already incurred. Response at 6-7.

Respondent contends that in addition to the above-mentioned reasons, petitioners’ motion should be denied because petitioners have not established that their petition was filed in good faith and with a reasonable basis. Response at 7-9.

C. Petitioners’ Reply.

Petitioners argue that *Avera* did not establish prerequisites or mandatory conditions that must met before a petitioner may receive an award of interim costs. Reply at 4 quoting *Dudash v. Sec’y, HHS*, No. 09-646V (Fed. Cl. Spec. Mstr. Apr. 7,

2011). Petitioners stress that awarding interim costs lies in the discretion of the special master. Reply at 4.

To address respondent's objection regarding a lack of evidence demonstrating petitioners' inability to pay, petitioners filed affidavits with their reply brief. The affidavits state that after being contacted by counsel, Ms. Klein and Mr. Lambert independently "informed them that, because of my current financial situation, I was unable to pay this cost. I am still unable to pay this litigation costs. Doing so would cause me great financial hardship." Affidavits of Courtney Klein and Shawn Lambert, filed as Reply Attachments A and B.

In their reply, petitioners did not directly counter respondent's position that the Vaccine Act requires a petitioner to first incur an expense and then seek reimbursement. See Reply at 5 ("The respondent argues that the Vaccine Act does not authorize payments of costs not yet incurred. While the autopsy slide re-cuts are not a necessary component of the petition pursuant to § 11(c), it is highly likely that either the respondent or the court will require this evidence.").

III. Analysis.

According to the Vaccine Act, petitions in the program are to be filed with a complete set of medical records and accompanied by an expert report.³ Therefore, the Act envisioned that the costs associated with procuring petitioners' medical records and obtaining an expert report would be borne by petitioners or their counsel prior to a complaint being filed. However, most cases are rarely fully developed prior to filing, and increasingly petitioners are requesting interim fees and costs to cover the expenses sustained while they develop their case.

In some instances, petitioners' motions for interim fees and costs are granted. However, the awarding of interim fees and costs is not automatic. See *Shaw*, 609 F.3d at 1376 (noting that the grant or denial of interim attorney fees and costs is a reviewable decision). In this case, I find that petitioners have not established a basis for an award of interim costs.

A. *Avera* factors.

While *Avera*, as petitioners note, did not establish an all-encompassing list of factors a special master is to consider when evaluating a motion for interim costs, the points raised in *Avera* are instructive. *Shaw*, 609 F. 3d at 1377; see also *McKellar v. Sec'y, HHS*, 101 Fed. Cl. 297, 301 (2011) (noting that "some special showing is necessary to warrant interim fees, including but not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship").

³ § 11(c), Vaccine Rule 2(c)(2)(A); see also Guidelines for Practice under the National Vaccine Injury Compensation Program, available at <http://www.uscfc.uscourts.gov/vaccine-programoffice-special-masters>, at 5-6.

This case has been pending for less than a year, and hence cannot be considered protracted. Nor can \$500.00 legitimately be deemed a “costly” expert expense. Similarly, petitioners have failed to demonstrate that the payment would result in an undue hardship. The filed affidavits provide no specifics regarding their income or financial situation. A cursory statement conveying that someone cannot afford a cost is insufficient to establish an undue burden. I note that unlike some pro se petitioners who move to proceed *informa pauperis*, Ms. Klein and Mr. Lambert did not express any hardship in conjunction with paying the \$350.00 filing fee less than a year ago.⁴ While their financial situations may have changed since then, they have provided no proof of such a change.

B. Necessity of Autopsy Slides.

Petitioners acknowledge that the Vaccine Act does not require the filing of autopsy slides. Motion at 6-7 citing § 11(c). The Act only requires the filing of the autopsy report, which petitioners’ have done. Petitioners’ Exhibit 7, filed Feb. 19, 2013. Petitioners have not explained why they feel the report is inadequate and the slides necessary to their case. In their motion and reply, petitioners only predict that either respondent or the court will request that they file the autopsy slides. However, to date such a request has not been made.

C. Incurred Costs.

The Vaccine Act indicates awards of compensation are to cover attorney fees and other costs *incurred* in proceedings associated with the petition. § 15(e)(1) (emphasis added). The word “incurred” is not defined in the statute but has been interpreted to mean “legally liable to pay.” *Black v. Sec’y, HHS*, 33 Fed. Cl. 546, 550 (1995). Here, petitioners have received what is, in essence, a price quote for the slides, but have not paid for the slides.

IV. Conclusion.

Petitioners have failed to establish a basis for advancing interim costs. Moreover, they have failed to establish the threshold requirements for an award of interim costs already incurred in this case. Therefore, **petitioners’ motion for interim costs is DENIED.** The clerk of the court shall enter judgment in accordance herewith.

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master

⁴ Ronald Homer was recognized as counsel of record on December 10, 2012; approximately three months after the petition had been filed by Ms. Klein and Mr. Lambert as pro se petitioners.